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Supreme Court of the United States

OCTOBER TERM 1961

No. 265

NOEL BRYANT JAMES,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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NOEL BRYANT JAMES,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justice of the Supreme Court of the United States:

The petition of Noel Bryant James, a major, citizen and resident of the State of Louisiana, for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment of June 6, 1961 in this case (R. 30-37; Appendix 1), respectfully represents:

I.

OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals was rendered June 6, 1961 (R-30); Appendix 1; and is reported at ... F. 2d ..... (1961).* Petition for rehearing was filed

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* Unreported at printing date.

June 22, 1961 (R-38); and was denied July 1, 1961 (R-56).

The opinion and decree of the United States Court for the Western District of Louisiana, dismissing the indictment, was rendered September 30, 1960 (R-9); and is reported at 187 F. Supp. 439 (1960), Appendix 2.

Absent a printed record in the Court of Appeals, the indictments identified in its opinion as Second Indictment (R-3, 31), and Third Indictment (R-1, 32); and the Motion to Dismiss the Indictment for Absence of Supporting Evidence (R-5) are appended (Appendices 3, 4 and 5, respectively).

II.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review the case on writ of certiorari is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (Section 1254 (1), Title 28 of the United States Code): "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * * "

The judgment of the Court of Appeals sought to be reviewed was dated and entered June 6, 1961 (R-37; Appendix 6). A petition for rehearing was denied July 1, 1961 (R-56; Appendix 7).

III.

QUESTIONS PRESENTED FOR REVIEW

1. Does an indictment for felony (embezzlement by a bank officer), conceded to be valid on its face and to have been returned by a duly constituted Grand Jury,

comply with the Constitutional guarantees of the Fifth Amendment (prosecution for felony only by indictment; and due process of law), when the indictment was returned **without submission to the Grand Jury of any evidence whatsoever?**

2. Absent any showing of abuse of discretion by the District Court in its finding that the indictment was returned without the offer of any supporting evidence to the Grand Jury, is its action of quashing the indictment subject to reversal? Petitioner asserts that the Court of Appeals for the Fifth Circuit erred in holding valid the indictment at issue; and in reversing the District Court's dismissal of that indictment in the face of these findings of the District Court (Court's emphasis):

1. "It is to be observed that in **Costello** there was **some** evidence before the Grand Jury when it indicated. Here there was **none.**" (R-19).
2. " * * * it is admitted that **no** evidence whatever was submitted to the Grand Jury before it returned the present indictment." (R-21).
3. "Only evidence could establish the true facts, and admittedly the Grand Jury had no evidence before it when it returned the present indictment." (R-22).

IV.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the Constitution of the United States of America is involved; more particularly those portions here italicized:

> "*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,* except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

2. The Act of June 25, 1948, c. 645, 62 Stat. 729 (18 U.S.C. Sect. 656) is involved:

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve Bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities entrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"As used in this section, the term 'national bank' is synonymous with 'national banking institution'; 'member bank' means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and 'insured bank' includes any bank, banking association, trust company, savings bank, or other banking institution,

the deposits of which are insured by the Federal Deposit Insurance Corporation."

V.

STATEMENT OF THE CASE

Federal jurisdiction in the court of first instance (United States District Court for the Western District of Louisiana) was based on the Act of June 25, 1948, c. 645, 62 Stat. 826 (18 (U.S.C. Sec. 3231), first paragraph:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

Petitioner was three times indicted for alleged violation of the statute (18 U.S.C. Sec. 656). The First Indictment, neither at issue nor of record here, was dismissed by the Government, conceding the validity of defendant's motion to dismiss for failure to state an offense (R-10, 31). It was invalid on its face.

The Second Indictment, returned February 19, 1960 (R-3; Appendix 3), was likewise dismissed by the Government, again conceding the merit of defendant's motion to dismiss for failure to state an offense (R-12, 13). This indictment, too, was invalid on its face, "because of the impossibility of ascertaining from it whether defendant was charged with a felony or misdemeanor". (R-31). Being invalid on its face, it was not supported by the presumption that an indictment valid on its face is founded on competent evidence; and the record does not disclose whether in fact any evidence was tendered to the Grand Jury which returned it.

The Third Indictment, here at issue (R-1; Appendix 4), was returned on April 21, 1960 by the same Grand

Jury which had returned the Second Indictment, having been recalled in session by the Government two months later. Defendant moved to dismiss this indictment as violative of his Constitutional guarantee of true indictment process for felony prosecution, and as a denial of due (indictment) process under the Fifth Amendment, because it was returned without the offer of any evidence whatsoever to the Grand Jury (R-5; Appendix 5). To the truth of this charge defendant made personal and categorical affidavit (R-7; Appendix 5); and invited the District Court, in such manner as its discretion might indicate, to the interrogation of the foreman and other members of the Grand Jury on the allegation of total absence of evidence offered.

The Government conceded that no evidence had been adduced; and the District Court in its opinion (Appendix 2) made these findings (Court's emphasis):

(1) "It is to be observed that in **Costello** there was **some** evidence before the Grand Jury when it indicted. Here there was **none.**" (R-19).

(2) " • • • it is admitted that **no** evidence whatever was submitted to the Grand Jury before it returned the present inditcment." (R-21).

(3) "Only evidence could establish the true facts, and admittedly the Grand Jury had no evidence before it when it returned the present indictment." (R-22).

Thus, the legal presumption that the Third Indictment, by mere regularity on its face, was supported by some competent evidence proffered the Grand Jury was rebutted and destroyed by the force of defendant's affidavit that there was no evidence; the Government's admission; and the District Court's finding of fact. Not

only was the presumption of validity rebutted, but also the contrary was preponderantly demonstrated. In such posture of the matter the District Court rightly concluded that the indictment was void, and quashed it.

Nowhere was the character, adequacy, competence or sufficiency of evidence before the Grand Jury in question. The entire thrust of the attack on the indictment was that there was **no evidence whatsoever**; and this the District Court found as a fact. Yet the Court of Appeals for the Fifth Circuit, on the Government's appeal, reversed; and held the indictment valid, predicated on its stated conclusion that: "We see nothing here to prevent the full application of the usual rule that an indictment, regular on its face and returned by a legally constituted Grand Jury, is presumed to be founded on competent evidence." (R-34; Appendix 1).

The argument to this conclusion by the Court of Appeals was premised on its **assumption** that the Grand Jury had heard some evidence when it returned the **Second Indictment**; and the proposition that: "The Grand Jury may use what it has legally heard before." (R-35; Appendix 1). Fallacy is manifest for these reasons: (1) This record discloses no evidence in fact before the Grand Jury when it returned the Second Indictment. (2) The Second Indictment was supported by no presumption of evidence because concededly it was not valid on its face.

Nor does the Court of Appeals anywhere suggest abuse of discretion by the District Court in its dismissal of the indictment on its finding of fact that there was no evidence before the Grand Jury when it indicted.

This is the judgment, then, to review which petitioner here seeks writ of certiorari.

VI.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The exercise by this Court of its supervisory jurisdiction to correct error through the writ of certiorari is proper and clearly indicated here because those considerations governing review on certiorari prescribed by Rule 19 of this Court are abundantly present.

In holding valid an indictment returned without any evidence whatsoever the Court of Appeals does not enjoy the harmony it professes with this Court's decision in *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956).

No inference of abuse of the judicial discretion of the District Court is possible on this record; nor does the Court of Appeals suggest abuse. Therefore, in reversal of the District Court's dismissal of the indictment, in its sound discretion, for absence of any supporting evidence whatsoever, without demonstrated abuse of that discretion, the Court of Appeals has departed from its own long established jurisprudence in the Fifth Circuit; and has fallen into discord with previously consistent jurisprudence of the Eighth Circuit and the Court of Appeals for the District of Columbia. The judgment here pronounced is completely opposed to the rule of law that:

> "A motion to quash an indictment for the absence or incompetency of evidence before the Grand Jury is addressed to the discretion of the trial court and its action thereon will not be reversed except upon a showing of abuse of discretion." *Carrado v. United States*, 210 F. 2d 712 (Ct. App. D. C.—1954); certiorari denied 347 U.S. 1018, 74 S. Ct. 874, 98 L. Ed. 1140.

Accord, in the Eighth Circuit: *Stewart v. United States*, 300 F. 769 (1924).

Previously in **accord**, Fifth Circuit: *Livezey v. United States*, 279 F. 496 (1922); and *Grace v. United States*, 4 F. 2d 658 (1925); certiorari denied, 268 U.S. 702, 45 S. Ct. 637, 69 L. Ed. 1165.

Thus, the judgment is in conflict with decisions both of this Court, and of other Courts of Appeals on a Constitutional principle of general import. It is fraught with hazard to the validity of the whole Grand Jury process; and creates a precedent dangerous to that basic right of the individual, heretofore so zealously guarded, that he shall not be charged with felony but on due presentment of evidence to a Grand Jury. The issue presented, the questions to be reviewed, are neither episodic nor ad hoc, but are critical to the entire process of prosecution for crime. The potential exposure of one individual, petitioner here, to trial and conviction on an invalid indictment becomes minimal in relation to the incidence of atrophy and distortion of Constitutional due process in Federal criminal procedure.

VII.

WHAT IS THE RULE IN COSTELLO'S CASE (350 U.S. 359)?

The basic error of the Court of Appeals for the Fifth Circuit lies in its misconception of the true reach of this Court's decision in *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956). As petitioner appreciates the *Costello Case*, its issue concerned the character, competence and sufficiency of evidence admittedly offered the Grand Jury, that evidence being exclusively hearsay; and this Court simply held the indict-

ment not open to challenge on the ground that the only evidence before the Grand Jury being hearsay, the same was incompetent and inadequate. Petitioner does not conceive that this Court held, or intended to pronounce as rule of law, that an indictment was not open to challenge for failure of proffer of any evidence whatsoever to the Grand Jury. Yet the indictment at bar has been upheld against that very attack, supported by the District Court's finding of its veracity.

The Court of Appeals, rejecting without reason or comment the District Court's conclusion of fact, held the indictment valid on the **assumption** (not demonstrable on the record) that evidence had been adduced in support of a previous indictment. Presumption of law does not warrant assumption of fact; and it is clear that the previous indictment (Second Indictment) was sustained by no legal presumption of supporting evidence because it was invalid and irregular on its face; had been so dismissed; and could afford no support for the present, or Third Indictment.

The heart of the court's reasoning was that: "The Grand Jury may use what it has legally heard before." (R-35; Appendix 1). That professed foundation of its judgment was based on the alleged legal presumption, but in fact fallacious assumption, that it had heard anything before.

The resulting error derived manifestly from this Court's pronouncement in the *Costello Case*, that:

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

If this Court said what it meant, and meant what it said, in that pronouncement, then petitioner is in error and not entitled to writ of certiorari. The *Costello Case* did not in truth, however, involve so much or such an issue; but simply whether an indictment was subject to the sole attack of the hearsay character of the only evidence before the Grand Jury. This Court's holding has here been extended to preclude attack based on no evidence before the Grand Jury. If the law affirmed by this Court does preclude that attack, then indeed Grand Jury indictment becomes nothing more than prosecutor's information, and the Grand Jury process has become totally emasculated. This danger was foreshadowed in the conclusion of Mr. Justice Burton's concurring opinion in the *Costello Case*, that:

> "To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

Exactly that has transpired here because, while Mr. Justice Burton's concern was limited in its expression to a lack of "substantial or rationally persuasive evidence", the devastating fact here is that there was no evidence.

If this Court meant in the *Costello Case* to establish as law that an indictment regular on its face can never be attacked for lack of evidence, then into the discard, too, goes the historic rule that the trial court's action quashing an indictment for want of any supporting evidence is not subject to reversal in the absence of manifest abuse of judicial discretion. Petitioner does not believe that is the rule or intent of the *Costello Case;* especially when it is noted that this Court's pronouncement

there left indictment open to attack in the nebulous area of Grand Jury bias.

VIII.

CONCLUSION

Petitioner submits error of the Court of Appeals: (1) In maintaining as valid an indictment returned without the submission of any evidence to the Grand Jury. (2) In reversing the action of the trial court quashing that indictment on its conclusion of fact that there was no evidence before the Grand Jury, without any showing or suggestion of abuse of discretion by the trial court in that action or in the findings on which it was based. Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its judgment of June 6, 1961, and for the correction of such errors; and that, upon due proceedings had thereon, the judgment of the Court of Appeals be reversed, and the indictment be dismissed.

Respectfully submitted,

GEORGE M. SNELLINGS, JR.,
P. O. Box 1663,
603 Bernhardt Building,
Monroe, Louisiana,
Attorney for Noel Bryant James, Petitioner.

I cerify that the respondent, the United States of America, through the United States Attorney for the Western District of Louisiana, and through the Solicitor General of the United States, has been notified, in the form and manner prescribed by the Rules of the Supreme Court of the United States, of the date of filing this petition, the docket number of the case, and the contents of

the record filed under Rule 21; and that copies of this petition for writ of certiorari have been served on the United States Attorney for the Western District of Louisiana, as the attorney of record who represented the United States in the court whose judgment is sought to be reviewed, and on the Solicitor General of the United States, by United States mail, properly addressed, postage prepaid; this July , 1961.

GEORGE M. SNELLINGS, JR.

APPENDIX 1.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18640

UNITED STATES OF AMERICA,
Appellant,

versus

NOEL BRYANT JAMES,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(June 6, 1961.)

Before RIVES, JONES and BROWN, Circuit Judge.

BROWN, Circuit Judge: This case presents the question whether the Grand Jury returning a second indictment must hear some evidence other than that heard prior to returning an earlier indictment relating to the same transaction and purporting to charge a like offense. The District Court thought it did, and dismissed the indictment. We disagree and reverse.

The facts of this record are few and simple. A former Grand Jury returned an indictment against the appellant presumably charging the theft, embezzlement or misapplication of certain furniture and fixtures belonging to an insured bank of which he was President.

Such property was asserted to be "moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank or * * * officer * * * *" as described in 18 USCA §656. We are not concerned with this indictment or its validity and mention it only to preserve the uniformity of reference to it as the First Indictment. It was dismissed by the Government after the attack by the defendant on the ground that chattel belonging to the bank were not "moneys, funds or credits" of the bank.

Subsequently, and after the impaneling of a new Grand Jury, it returned on February 19, 1960, what is called the Second Indictment. It alleged that defendant, as president of the insured bank, embezzled and converted to his own use a credit of such bank represented by a promissory note, signed by specifically named makers and payable to the defendant personally in the sum of $5,000, which defendant had received in payment for furniture and fixtures belonging to the bank and which note he thereafter sold to a third party.

The defendant attacked this Second Indictment on the ground that it was fatally defective because of the impossibility of ascertaining from it whether defendant was charged with a felony or misdemeanor.[1] While the motion was pending and before any action was taken on it by the Court, the Government did two things. First it had the Grand Jury recalled on April 21, 1960, at which time the Third Indictment was returned. Next, and immediately after the return of the Third Indictment, the Second Indictment was voluntarily dismissed by the Government.

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[1] This was based on the monetary classification of the statute by which misappropriation, etc. of credits of a value in excess of $100 is a felony, whereas if the value is less than $100 it constitutes a misdemeanor. 18 USCA §656.

The Third Indictment was returned on April 21, 1960, by the same Grand Jury and under the signature of the same foreman as the Second Indictment of February 19, 1960. The language of the Third Indictment was identical with that of the Second except that in referring to the $5,000 promissory note payable to defendant the Third Indictment expressly stated that it was "of a value in excess of One Hundred * * * Dollars" and had been sold by defendant to the third party "for a sum in excess of One Hundred * * * Dollars." Since the Second Indictment was thereafter voluntarily dismissed, the Third Indictment was now the sole pending charge.

To the Third Indictment the defendant filed a motion attacking its validity on the ground that no evidence whatsoever was heard by the Grand Jury at the time the Third Indictment was heard and returned. The defendant's personal affidavit verified that categorical statement in the motion.[2]

As the Government's brief before us and the Trial Court's opinion each reflect, on the hearing of the motion to dismiss the Third Indictment the Government conceded that no witnesses were presented to or heard by the Grand Jury at the time of the return of the Third Indictment.

It is important, however, to stress the limited *time* covered by that concession, as well as that in defendant's supporting affidavit. Neither the Government's statement nor defendant's affidavit undertook to negative the ap-

[2] The motion also requested the Court to allow defendant by appropriate subpoenas to examine into the Grand Jury proceedings and, alternatively, requested the Court in its discretion to do so in camera since, it asserted, "such investigation of matters occurring and of the submission of this cause to the Grand Jury will disclose grounds establishing the validity of this motion to dismiss the indictment for absence of any competent supporting evidence whatsoever."

pearance of witnesses and the hearing of evidence by this Grand Jury concerning this transaction at times prior to April 21, 1960.

Much of the argument below and here has been over the invalidity of the Second Indictment. The defendant's theory has been that where value is essential to establish the grade of the offense as a misdemeanor or felony, there must be a positive allegation of valuation, hence no felony was charged. *Cartwright v. United States*, 5 Cir., 1944, 146 F. 2d 133 at 135; 32 Am. Jur., *Larceny* §112 at 1023. To overcome the charge as a misdemeanor he asserted that since credits, not chattels, of the bank constitute the subject of the statute, a nominal value may not be attributed to the paper as has sometimes been done in other circumstances. See, e.g., *Clark v. United States*, 6 Cir., 1920, 268 Fed. 329; *Jolley v. United States*, 1898, 170 U.S. 402, 18 S. Ct. 624, 42 L. Ed. 1085; *Keller v. United States*, 7 Cir., 1909, 168 Fed. 697.

But we are not concerned with the validity of the Second Indictment. It no longer exists. What, and all. there is in controversy is the validity of the Third Indictment, and that for the equally narrow, specific contention that no evidence was heard *at the time* it was returned.

We see nothing here to prevent the full application of the usual rule that an indictment, regular on its face and returned by a legally constituted Grand Jury is presumed to be founded on competent evidence. *Costello v. United States*, 1956, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397; *Holt v. United States*, 1910, 218 U.S. 245 at 247-48, 31 S. Ct. 2, 54 L. Ed. 1021; *United States v. Texeira*, 2 Cir., 1947, 162 F. 2d 169 at 170; *United States v. Sugarman*, D.C.D. Rh.I., 1956, 139 F. Supp. 878 at 88[illegible]; *United States v. Quinn*, E.D. N.Y., 1953, 116 F. Supp. 802 at

804; *United States v. Brumfield*, W.D. La., 1949, 85 F. Supp. 696 at 704; *United States v. Fujimoto*, D.C.D. Hawaii, 1952, 102 F. Supp. 890 at 894. There is a complete absence of any positive factual showing that this Grand Jury did not at any time while it was hearing evidence concerning this transaction have before it some evidence from which it could infer a valuation in excess of $100. Cf. *Brady v. United States*, 8 Cir., 1928, 24 F. 2d 405 at 407-8.[3]

We decline to counteract that presumption by finding or creating the other one implicit in *State v. Ivey*, 1888, 100 N.C. 539, 5 S.E. 407, so heavily relied upon by the District Court. That case undertook to hold that before a Grand Jury may return a second indictment against the defendant concerning the same transaction it must physically rehear at least so much of the evidence as is necessary to cover such essential element of the crime. In reality it works out another presumption—the presumption that the Grand Jury must not have had evidence touching upon the element inadequately alleged in the first indictment otherwise it would have returned an indictment in proper legal form and language.[4]

The fact that the same Grand Jury after hearing evidence has previously returned an indictment purporting to charge the same offense does not deprive the subsequent indictment returned without hearing additional evidence of the usual presumption of validity. The Grand

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[3] The continued vitality of this case may be uncertain. See the reference to it and similar cases by the Supreme Court in *Costello v. United States*, *supra*, 350 U.S. 359 at 361, note 4.

[4] This was the theory followed by the District Court below in its memorandum opinion. "In the present case the second indictment was defective in its substance, in failing to allege either a felony or a misdemeanor. Obviously, there was no evidence before this Grand Jury as to the value of the note when it returned the second indictment. Otherwise, it would have been alleged. Likewise, there must have been no evidence then as to defendant's having sold the note for more than $100, or that, too, would have been alleged. * * * "

Jury may use what it has legally heard before. *Eidson v. United States*, 10 Cir., 1959, 272 F. 2d 684 at 687; *Thompson v. United States*, 9 Cir., 1913, 202 Fed. 401 at 404; *United States v. Bopp et al.*, N.D. Calif., 1916, 232 Fed. 177 at 178; Ex parte Harlan, N.D. Fla., 1909, 180 Fed. 119 at 129. It has been well stated by the 10th Circuit. "The grand jury having heard the witnesses once, it was not essential to the validity of the second indictment that they be recalled and give in the form of repetition the evidence previously given before the same grand jury. It was well within the province of the grand jury to return the second indictment without recalling the witnesses and hearing them anew." 272 F. 2d 684 at 687. And when, in this fashion, it has heard some evidence, the sufficiency, adequacy, or competency of that evidence may not be inquired into by an attack on the indictment. *Costello v. United States*, 350 U.S. 359 at 363; see 59 ALR 567, Pars. II, III, IV at 573, 579, 581; 31 ALR 1479.

The Indictment was and is valid.

REVERSED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana
Jul 12 1961

[SEAL]

APPENDIX 2.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

CRIMINAL ACTION
No. 15,555

UNITED STATES OF AMERICA
vs.
NOEL BRYANT JAMES

BEN C. DAWKINS, JR., Chief Judge.

RULING ON MOTION TO QUASH INDICTMENT.

Attempted prosecution of this defendant almost has reached the point where it fairly could be called persecution, for this is the third indictment returned against him within a period of twelve months, all based upon 18 U.S.C. §656 and involving substantially the same set of circumstances.

He first was indicted on May 14th, 1959, in Criminal Action No. 15,317. His counsel promptly moved to quash, filing an unanswerable brief in support. After some consideration of the motion and brief, and being convinced that the motion was good, the United States Attorney consented in writing that it be granted. Thus ended Chapter One.

Chapter Two began on February 19th, 1960, when the second indictment was returned, in Criminal Action No. 15,512. Because of its importance as to the issue

now before the Court, we quote it in full:

> "That on or about December 23, 1957, in the Monroe Division of the Western District of Louisiana, NOEL BRYANT JAMES, then the President and an officer of the Farmerville Bank, Farmerville, Louisiana, an insured bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did, with intent to injure and defraud the said Farmerville Bank, knowingly, unlawfully and fraudulently embezzle and convert to his own use, benefit and advantage, a certain credit of the said Farmerville Bank, to-wit: a promissory note dated at West Monroe, Louisiana, December 16, 1957, executed and signed by Wayne R. Deacon and J. C. Lolly, as co-makers thereof, and payable to the order of N. B. James, the defendant, on or before December 1, 1962, in the sum of $5,000.00, by the following manner and means: that the said defendant, by virtue of his position as President of the said Farmerville Bank, did, on or about December 16, 1957, sell for and on behalf of the said Bank to Wayne R. Deacon and J. C. Lolly certain property, to-wit: furniture and fixtures owned by the said Bank and in payment for said property, the said defendant did receive the aforesaid promissory note which he, the said defendant, sold to the Farmerville Brokerage and Insurance Agency, Inc., the said defendant then knowing full well that the said promissory note was the property of the said Bank and constituted a credit thereof. (18 U.S.C. 656)"

Defendant's counsel again promptly moved to quash, on the ground that 18 U.S.C. §656[1] classifies as a felony

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[1] § *656. Theft, embezzlement, or misapplication by bank officer or employee*

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, or national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a

Continued

an embezzlement of "moneys, funds or credits" of a value in excess of $100, but also provides, in substance, that if the value does not exceed $100, the offense shall be a misdemeanor; and that inasmuch as the indictment did not allege the *value* of the note, it was fatally defective because of the impossibility of ascertaining from it whether defendant was charged with a felony or a misdemeanor. Another brief was filed citing authorities[2]

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[1] (Continued)
Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"As used in this section, the term 'national bank' is synonymous with 'national banking association'; 'member bank' means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and 'insured bank' includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. June 25, 1948, c. 645, 62 Stat. 729."

[2] *Cartwright v. United States*, 5 Cir., 146 F. 2d 133:

"Congress by statute passed in 1909, Sec. 541, 18 U.S.C.A., declared: 'All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors', and it has been uniformly held that it is not the actual punishment imposed but that which the statute authorizes which determines whether a crime is a felony or a misdemeanor. It is, therefore, well settled that where the grade of larceny, and consequently the punishment, depend on the value of the property, it is essential that the value of the property defendant is charged with having taken be alleged and proved, 32 Am. Jur., Sec 112, p. 1023."

American Jurisprudence, Vol. 32, "Larceny", Sec. 112, p. 1023:

"It is a well-settled rule of the common law that an indictment for larceny must allege the value of the article alleged to have been stolen. This rule had its origin in the practice of distinguishing between grand and petit larceny with reference to the extent of the punishment, that being dependent in some measure upon the value of the article stolen. And at the present time the rule is that where the grade of larceny, and consequently the punishment, depends on the value of the property, it is essential that the value be alleged."

See also: *Corpus Juris Secundum*, Vol. 52, "Larceny", Sec. 78, pp.

Continued

which clearly demonstrated that this motion, too, was good, and ought to be sustained.

Upon request of Government counsel, they were granted thirty days from March 31, 1960, within which to file a reply brief. Instead of doing so, however, they took another tack, on April 21, 1960, by moving for the voluntary dismissal of the second indictment immediately after they had caused the Grand Jury to return a new, and so-called "superseding," indictment, in Criminal Action No. 15,555, now before us. Thus ended Chapter Two and Chapter Three began.

This indictment is virtually identical in language to the second one, except that it adds allegations to the effect that the note was " • • • of a value in excess of $100 • • • " and that it was sold by defendant " • • • for a sum in excess of $100 • • • ". It was returned by the same Grand Jury which returned the second one but—and this is the rub—there was *no* evidence whatever presented before the Grand Jury when it returned the present, third, indictment, some sixty days later. This the Government concedes.

Defendant now has moved to quash this indictment on the ground that it is violative of his rights under the Fifth Amendment[3] in that there was *no* evidence presented before the Grand Jury (which previously had returned the second bill alleging no value as to the note)

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[2] (Continued)
879, 881; *State v. Wilson*, (La. Sup. Ct.) 150 La. 873, 91 So. 249 (1922), accord, *State v. Pace*, 174 La. 295, 140 So. 482 (1932); *Henry v. United States*, 263 F. 459; *People v. Meyers*, 397 Ill. 286, 73 N.E. 2d 288; *Wright v. Commonwealth*, 196 Va. 132, 82 S.E. 2d 602; *State v. Baker*, 138 Atl. 736; *Price v. State*, 308 S.W. 2d 47; *Steel v. State*, 217 S.W. 2d 857; and *Wilson v. State*, (Ala.) 1 Porter 118.

[3] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, • • • ."

to justify its allegations now that the note was of a value in excess of $100, and that it was sold by defendant for more than $100.

In support of his position, and in the absence of any Federal decisions squarely in point, defendant relies heavily, and we believe soundly, upon *State v. Ivey*, 5 S.E. 407, decided by the Supreme Court of North Carolina in 1888. In quashing a new indictment, the Court said:

> "If, as in this case, the indictment be found to be defective, a fresh bill may be sent at the same term before the same grand jury that found the insufficient indictment, and they may act upon it. *State v. Harris*, 91 N.C. 656. But they cannot do so basing their action entirely upon what witnesses testified to when they had the first bill under consideration, without a re-examination of the witnesses, or the examination of other witnesses, or hearing other proper evidence before them. This is so because the fresh or second bill is as to them a new and independent one, different in some of its features from the first indictment; it charges the offense in a different way to a greater or less extent; it may charge a different offense altogether. The witnesses might testify differently from what they at first did, in view of the new bill; they might modify what they at first said; they might testify as to additional facts; they may have testified falsely at first; they might testify truly upon re-examination. As to the second bill, there was no evidence before the grand jury at all in contemplation of law. They must act upon evidence taken in respect to the bill of indictment before them. This is essential in the intelligent and fair discharge of their important duty, to give the evidence just application, point, and force, and to identify the witnesses with and render them responsible for what they testify

to in the course of the prosecution. They, in this case, did not testify as to the new bill."

Defendant also relies upon *Brady v. United States*, (8 Cir.) 24 F. 2d 405, which stated:

> "It is the settled law of this circuit, we think, that an indictment will be quashed, where there was either no evidence whatever, or no competent evidence of the offense charged, presented to the grand jury * * *. We think the same rule should be applied where a grand jury returns an indictment without any evidence whatever before it of a separate, distinct, and essential element of the offense, such as the use of the mails under Section 215, and the overt act or acts under Section 37.
>
> * * * * *
>
> " 'The doctrine that a grand jury may indict without evidence, if tolerated, would establish a precedent subversive of the liberty of the citizen, and his safety and security, and the good name and fame of any innocent person might at any time be blasted.' "

He also cites as persuasive *United States v. Farrington*, 5 F. 343, where the Court ruled:

> "It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation, and contumely of a trial for a criminal offense unless the charge has been investigated and a reasonable foundation shown for an indictment or information.
>
> * * * * *
>
> "It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that

> the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should interfere and quash the indictment."

And he also would have us follow the language of Chief Judge Learned Hand, in *Costello v. United States*, (2d Cir.) 221 F. 2d 668, reading:

> "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated."

For its part, the Government contends that this is merely a "superseding" indictment based upon evidence which was produced before the Grand Jury prior to its returning the indictment of February 19th, 1960. To quote exactly from its brief:

> ". . . . The Government frankly admits and concedes that not a single witness was called before the Grand Jury when the third, or superseding, Indictment was returned, the position of the Government in that particular regard simply being that inasmuch as the Grand Jury had heard the Government's evidence when the second Indictment was returned on February 19, 1960, recalling the same witnesses for the giving of repetitious testimony on April 21, 1960, the date on which the superseding Indictment was returned, would have been a vain and useless thing."

The Government further argues that defendant's position would be valid if the second and third indictments had been returned by different Grand Juries, but that this is not so when they were returned by the same

Grand Jury. It also urges that it is inconceivable that the witnesses who appeared before the inquisitorial body prior to the second indictment did not testify as to the value of the note; and that, since it was in the sum of $5,000, it is bound to have had a value of more than $100.

In support of its position, the Government relies upon *State v. Richard*, (La. Sup. Ct., 1898) 50 La. Ann. 210, 23 So. 331, where the Court said:

> "If, as we may infer from the facts in the record, the grand jury had previously heard testimony, and, after hearing it, had returned an indictment into court which was quashed, there was not the least necessity for re-examining the witness and reconsidering the testimony to return another indictment into court. The formality of re-examination of witnesses, or of reconsidering the knowledge upon which the grand jury had previously acted, would have been vain and tedious."

It also depends upon *Ex Parte Harlan*, 180 F. 119, which it says is to the same effect; and for the general proposition that indictments are presumed to be founded upon competent evidence, it cites *U. S. v. Sugarman*, 139 F. Supp. 878; *U. S. v. Quinn*, 116 F. Supp. 802; *U. S. v. Weber*, 197 F. 2d 237; *U. S. v. Texeira*, 162 F. 2d 169; *U. S. v. Fujimoto*, 102 F. Supp. 890; *Costello v. U. S.*, 350 U.S. 359; *U. S. v. Brumfield*, 85 F. Supp. 696.

Thus the Government contends that defendant's motion has no merit and should be denied.

Analyzing first the authorities relied on by the Government, we consider *Costello, supra*. There the defendant was indicted and convicted for willfully attempting to evade payment of income taxes. Voluminous evidence

was presented at the trial, including the testimony of three Government agents, who summarized the evidence and introduced computations showing, if believed by the jury, that Costello and his wife received far more income than they reported. Prior to the trial, Costello moved for inspection of the Grand Jury minutes and to dismiss the indictment, these motions being denied. At the trial, it developed from the evidence that the three Government agents were the only witnesses who appeared before the Grand Jury. After conviction, Costello appealed, contending that the indictment was based solely on hearsay evidence. Both the Court of Appeals and the Supreme Court refused to dismiss the indictment, the latter ruling:

> "In *Holt v. United States*, 218 U.S. 245, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence 'there was very little evidence against the accused.' The Court refused to hold that such an indictment should be quashed, pointing out that 'The abuses of criminal practice would be enhanced if indictments could be upset on such a ground'. 218 U.S., at 248. The same thing is true where as here all the evidence before the grand jury was in the nature of 'hearsay.' If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

In a concurring opinion, Mr. Justice Burton noted his views:

> "I agree with the denial of the motion to quash the indictment. In my view, however, this case does not justify the breadth of the declarations made by the Court. I assume that this Court would not preclude an examination of grand-jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persausive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

It is to be observed that in *Costello* there was *some* evidence before the Grand Jury when it indicted. Here there was none.

In *Ex Parte Harlan, supra*, the defendants were convicted of conspiracy to violate the peonage laws. On an application for *habeas corpus* after conviction, they contended that the Grand Jury had indicted them without hearing any evidence. The record showed that the Grand Jury found two indictments against them, but that the United States Attorney believed them to be defective. Therefore, he presented to the Grand Jurors a third indictment and retired from the room. The Foreman then read the indictment aloud and asked if anyone had any objection to it. Upon hearing none, he signed it. The Court held the indictment valid, saying:

> " • • • This indictment was evidently founded upon the testimony of witnesses on two previous days touching the offense upon which the grand

> jury at that session had already found two other indictments; and was preferred, to cure supposed defects in the earlier indictments touching the same matter. Under such circumstances, it was not necessary, or at all essential to the validity of the last indictment, that the witnesses be recalled before the grand jury and go over their former testimony. * * * "

As shown by the quotation, all three indictments were returned by the same Grand Jury obviously within a matter of a few days of each other. The evidence the jurors had heard was still very fresh. Here more than sixty days had elapsed between the second and third indictments. On appeal in *Harlan*, the Supreme Court, at 218 U.S. 442, 31 S. Ct. 44, 54 L. Ed. 1101, in affirming the lower Court, pretermitted the question of the alleged lack of "legal evidence" before the Grand Jury, and ruled that, if such an objection were available, it could not be raised for the first time in a *habeas corpus* proceeding after conviction.

In *Richard*, it is not shown what period of time elapsed between the two indictments or whether the defect upon which the earlier indictment was quashed was merely one of form or of substance. In the present case the second indictment was defective in its substance, in failing to allege either a felony or a misdemeanor. Obviously, there was no evidence before this Grand Jury as to the value of the note when it returned the second indictment. Otherwise, it would have been alleged. Likewise, there must have been no evidence then as to defendant's having sold the note for more than $100, or that, too, would have been alleged. In the present indictment, both the alleged *value*, of the note and the *price* for which it was sold are set forth—substantive allegations which were not made in the second indictment—

and yet it is admitted that *no* evidence whatever was submitted to the Grand Jury before it returned the present indictment.

This is not, as the Government calls it, merely a "superseding" indictment, or an amendment to the second indictment. It is a *new* indictment with specific allegations of value and amount so as to charge a felony—a crucial difference in substance.

We can no more assume, in keeping with the Government's argument, that, merely because the note was in the face amount of $5,000, it was bound to be worth more than $100, than we can assume, in the absence of specific allegations, that there was evidence before the Grand Jury prior to the second indictment as to the value of the note or the amount for which it was sold. The note could have been worth its full face value or it could have been completely worthless. Only evidence could establish the true facts, and admittedly the Grand Jury had no evidence before it when it returned the present indictment.

As noted in *Ivey, supra*, in the more than sixty days that elapsed between the return of the second and third indictments, the witnesses—if they had been called, and under basic concepts of due process defendant was entitled to have them called—might have testified differently from what they at first did, in view of the new bill; they might have modified what they at first said; they might have testified as to additional facts; and they might have testified falsely at first and truly upon re-examination. Moreover, in the light of such re-examination, the Grand Jury might not have indicted at all.

In the final analysis, therefore, what the Govern-

ment is seeking to have us do is to blindly follow the usual presumption as to the validity of an indictment, when the record fairly cries out against that conclusion here. This we cannot do.

On the authority, therefore, of *Ivey*, *Brady* and *Farrington*, and finding nothing in the cases cited by the Government to he contrary, we must follow those decisions because of their sound reasoning and because, as applied to this case, they conform to our convictions as to the true meaning of due process of law under the Constitution.

Thus ends the Third Chapter. Without measuring the merits of this case, which have not been heard, we cannot help but observe that three times now defendant has been stigmatized by invalid indictments. It remains to be seen whether there will be a Fourth Chapter, or more, to pass before us.

For the reasons given, we are bound in justice to conclude that the indictment must be quashed. IT IS SO ORDERED.

THUS DONE AND SIGNED, in Chambers, in Shreveport, Louisiana, on this the 30th day of September, 1960.

s BEN C. DAWKINS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX 3.

SECOND INDICTMENT (R-3)

That on or about December 23, 1957, in the Monroe Division of the Western District of Louisiana, NOEL BRYANT JAMES, then the President and an officer of the Farmerville Bank, Farmerville, Louisiana, an insured bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did, with intent to injure and defraud the said Farmerville Bank, knowingly, unlawfully and fraudulently embezzle and convert to his own use, benefit and advantage, a certain credit of the said Farmerville Bank, to-wit: a promissory note dated at West Monroe, Louisiana, December 16, 1957, executed and signed by Wayne R. Deacon and J. C. Lolly, as co-makers thereof; and payable to the order of N. B. James, the defendant, on or before December 1, 1962 in the sum of $5,000.00, by the following manner and means: that the said defendant, by virtue of his position as President of the said Farmerville Bank, did, on or about December 16, 1957, sell for and on behalf of the said Bank to Wayne R. Deacon and J. C. Lolly certain property to-wit: furniture and fixtures owned by the said Bank and in payment for said property, the said defendant did receive the aforesaid promissory note which he, the said defendant, sold to the Farmerville Brokerage and Insurance Agency, Inc., the said defendant then knowing full well that the said promissory note was the property of the said Bank and constituted a credit thereof. (18 U.S.C. 656)

A TRUE BILL
s/ Burrows J. Wheless
FOREMAN

s/ T. Fitzhugh Wilson

T. FITZHUGH WILSON
United States Attorney

s/ E. V. Boagni

E. V. BOAGNI
Assistant United States Attorney

Filed February 19, 1960
Alton L. Curtis, Clerk

APPENDIX 4.

THIRD INDICTMENT (R-1)

That on or about December 27, 1957, in the Monroe Division of the Western District of Louisiana, NOEL BRYANT JAMES, then the President and an officer of the Farmerville Bank, Farmerville, Louisiana, an insured bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, did, with intent to injure and defraud the said Farmerville Bank, knowingly, unlawfully and fraudulently embezzle and convert to his own use, benefit and advantage, a certain credit of the said Farmerville Bank, of a value in excess of One Hundred and No/100 ($100.00) Dollars, to-wit: a promissory note dated at West Monroe, Louisiana, December 16, 1957, executed and signed by Wayne R. Deacon and J. C. Lolly, as co-makers thereof, and payable to the order of N. B. James, the defendant, on or before December 1, 1962 in the sum of $5,000.00. by the following manner and means: that the said defendant, by virtue of his position as President of the said Farmerville Bank, did, on or about December 16, 1957, sell for and on behalf of the said bank to Wayne R. Deacon and J. C. Lolly certain property, to-wit: Furniture and fixtures owned by the said Bank and in payment for said property, the said defendant did receive the aforesaid promissory note, of a value in excess of One Hundred and No/100 ($100.00) Dollars, which he, the said defendant, sold to the Farmerville Brokerage and Insurance Agency, Inc., for a sum in excess of One Hundred and No/100 ($100.00) Dollars, the said defendant then knowing full well that the said promissory note was the property of the said Bank and constituted a credit thereof. (18 U.S.C. 656)

A TRUE BILL:

s/ Burrows J. Wheless
FOREMAN

s/ T. Fitzhugh Wilson

T. FITZHUGH WILSON
United States Attorney

s/ E. V. Boagni

E. V. BOAGNI
Assistant United States Attorney

Filed April 21, 1960
Alton L. Curtis, Clerk

APPENDIX 5.

MOTION TO DISMISS THE INDICTMENT FOR ABSENCE OF SUPPORTING EVIDENCE (R-5)

The defendant, Noel Bryant James, respectfully moves the Court that the indictment herein be dismissed for the reason that it was presented and returned by the Grand Jury acting without the appearance of a single witness before the Grand Jury, and without any competent supporting evidence whatsoever; that same is consequently null and void; and that any prosecution or conviction under said indictment would operate to deprive this defendant of liberty or property without due process of law, charging him, as it purports to do, of infamous and felonious crime without true process of indictment, in contravention of the Fifth Amendment to the Constitution of the United States of America.

The defendant, Noel Bryant James, for the submission and determination of this motion in connection with this judicial proceeding here pending, respectfully moves and requests of the Court that he be permitted to examine pursuant to sub poena and under oath; or, alternatively, that the Court acting in its discretion examine under subpoena and under oath in camera, the foreman and other members of the Grand Jury acting herein, and to interrogate and inquire of them with respect to the testimony or evidence, if any, offered or submitted in support or as a basis of the return of this indictment; the defendant specifically averring that such investigation of matters occurring and of the submission of this cause to the Grand Jury will disclose grounds establishing the validity of this motion to dismiss the indictment for absence of any competent supporting evidence whatsoever.

WHEREFORE, PREMISES CONSIDERED, the defendant, Noel Bryant James, respectfully prays for the entry of such orders, decrees and directions herein as may be appropriate to the hearing and submission of this motion; for inquiry of the Grand Jurors heretofore acting herein, under subpoena and under oath, in open court or in camera in the discretion of the Court, as to the submission vel non of testimony or other supporting competent evidence to them as a basis for the presentment and return of this indictment; and, upon all due proceedings had, for appropriate orders herein dismissing this indictment for absence of supporting evidence, and as returned without supporting testimony or other competent evidence whatsoever, and discharging the defendant herein.

Monroe, Louisiana, this May 21, 1960.

s/ George M. Snellings, Jr.

George M. Snellings, Jr.
P. O. Box 1663
Monroe, Louisiana
Attorney for the Defendant,
Noel Bryant James

STATE OF LOUISIANA
PARISH OF OUACHITA

BEFORE ME, the undersigned authority, a Notary Public duly commissioned and qualified, personally came and appeared NOEL BRYANT JAMES, who, being duly sworn, did depose and state:

That affiant is the defendant in the above styled and numbered proceeding of United States of America v. Noel Bryant James, No. 15,555 on the Criminal Docket of the United States District Court for the Western Dis-

trict of Louisiana, and movant in the above and foregoing motion to dismiss the indictment; that affiant has read the above motion to dismiss the indictment and that the allegations of fact therein contained are true and correct; and that affiant particularly makes affidavit hereto that no witness was called, no testimony offered, and no other supporting evidence tendered to the Grand Jury heretofore acting herein, which made presentment and returned this indictment against this affiant to support, warrant, or authorize the issuance, finding or return of this indictment.

Affiant did further depose and state that a duplicate original of this motion and the affidavit herein has been served on the United States Attorney by forwarding this date, properly addressed, postage prepaid, to Honorable T. Fitzhugh Wilson, United States Attorney for the Western District of Louisiana, in Shreveport, Louisiana.

s/ Noel Bryant James
Noel Bryant James

SWORN TO AND SUBSCRIBED before me, on this, the 21 day of May, A. D., 1960.

s/ George M. Snellings, Jr.
Notary Public
Parish of Ouachita
State of Louisiana

Filed May 23, 1960
Alton L. Curtis, Clerk

APPENDIX 6.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1960

No. 18,640

D. C. Docket No. 15,555 Crim.

UNITED STATES OF AMERICA,
Appellant,

versus

NOEL BRYANT JAMES,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before RIVES, JONES and BROWN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court the judgment of the said District Court in this cause be, and the same is hereby, reversed.

June 6, 1961

Issued:

APPENDIX 7.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,640

UNITED STATES OF AMERICA,
Appellant,

vs.

NOEL BRYANT JAMES,
Appellee.

Appeal from the United States District Court for the Western Dsitrict of Louisiana.

(July 1, 1961)

ON PETITION FOR REHEARING

Before RIVES, JONES and BROWN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 265

NOEL BRYANT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 30–36; Pet. App. 15–20) is reported at 290 F. 2d 866. The opinion of the district court (R. 9–23; Pet. App. 21–33) is reported at 187 F. Supp. 439.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1961 (R. 37; Pet. App. 41). A petition for rehearing was denied on July 1, 1961 (Pet. App. 42). The petition for a writ of certiorari was filed on July 28, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A grand jury returned an indictment charging petitioner, as president of a bank, with embezzling a credit of the bank, described as a promissory note for $5,000. Petitioner moved to dismiss on the ground that it could not be determined from the face of the indictment whether it charged a misdemeanor, for which the value of the credit must be less than $100, or a felony, for which the value of the credit must be in excess of $100. While the motion was pending, the grand jury was recalled and it returned a superseding indictment in the same terms, but with an additional allegation that the note was "of a value in excess of" $100.00. The question is whether the superseding indictment was void for failure of the grand jury to hear some evidence in addition to the evidence it had already heard before it returned the first indictment.

STATUTE INVOLVED

Title 18, Section 656 of the U.S. Code provides in pertinent part:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank * * * embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds, or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee * * *, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not

exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioner was indicted on April 21, 1960, in the United States District Court for the Western District of Louisiana on a charge of embezzling a credit of a bank, in violation of 18 U.S.C. 656 (R. 1–2). The district court sustained petitioner's motion to dismiss the indictment (R. 9–23; Pet. App. 21–33). On appeal by the government, the court of appeals reversed (R. 30–36; Pet. App. 15–20, 41).

The circumstances giving rise to the question on which petitioner seeks review are as follows:

1. On February 19, 1960, the grand jury had returned an indictment which alleged that on or about December 23, 1957, petitioner, then the president of the Farmerville Bank, an insured bank, had embezzled and converted to his own use a credit of the bank, described as a promissory note for $5,000, dated December 16, 1957, signed by Wayne R. Deacon and J. C. Lolly as co-makers, and payable to the order of petitioner personally. The indictment further alleged that petitioner had sold, on behalf of the bank, certain furniture and fixtures of the bank to Deacon and Lolly and had sold their note, which he received in payment, to the Farmerville Brokerage and Insurance Agency, knowing that it was the property and a credit of the bank (R. 3–4; Pet. App. 34).[1]

[1] On May 14, 1959, a former grand jury had returned an indictment against petitioner under the same statute, 18 U.S.C. 656. That indictment alleged the misapplication of furniture

Petitioner moved to dismiss the indictment on the ground that, since 18 U.S.C. 656 denominates the offense charged as a misdemeanor if the value of the embezzled property does not exceed $100 and as a felony if its value exceeds that amount, and since the indictment did not allege the value of the note involved, the indictment made it impossible to determine whether petitioner was charged with a felony or a misdemeanor (R. 11–12; Pet. App. 21–23).

2. While petitioner's motion was pending, the government again referred the matter to the same grand jury, which returned the present superseding indictment of April 21, 1960. Immediately after the return of the new indictment, the district court sustained the government's motion to dismiss the February indictment (R. 12–13; Pet. App. 24). The superseding indictment, over the signature of the same grand jury foreman who had signed the earlier indictment, was identical with the earlier indictment, except that, in describing the note, the superseding indictment contained the additional clause, "of a value in excess of One Hundred and No/100 ($100.00) Dollars", and alleged that petitioner's sale of the note to the Farmerville Brokerage and Insurance Agency was "for a sum in excess of One Hundred and No/100 ($100.00) Dollars" (R. 1–2; Pet. App. 36).

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and fixtures belonging to the bank. It was dismissed on petitioner's motion, to which the government consented, on the ground that chattels belonging to a bank are not "moneys, funds or credits" within the meaning of the statute (R. 10, 30–31).

Petitioner moved to dismiss the superseding indictment on the ground that it was returned by the grand jury "acting without the appearance of a single witness * * * and without any competent supporting evidence whatsoever" (R. 5; Pet. App. 38).

In opposing the motion, government counsel conceded that no witnesses were "called before the Grand Jury when the third,[2] or superseding, Indictment was returned", but pointed out that "inasmuch as the Grand Jury had heard the Government's evidence when the second Indictment was returned on February 19, 1960, recalling the same witnesses for the giving of repetitious testimony on April 21, 1960, the date on which the superseding Indictment was returned, would have been a vain and useless thing" (R. 16; Pet. App. 27).

In sustaining the motion to dismiss, the district court, after observing that the indictment returned in February was "defective in its substance, in failing to allege either a felony or a misdemeanor", stated that there was "no evidence before this Grand Jury as to the value of the note when it returned [the February] indictment. Otherwise, it would have been alleged. Likewise there must have been no evidence then as to defendant's having sold the note for more than $100, or that, too, would have been alleged." The court concluded that, in view of the government's concession that the evidence presented to the grand jury prior to the return of the February indictment was not presented to the grand jury again prior to the return of the April indictment, which it characterized

[2] See note 1 above.

as a "new indictment", the presumption of validity did not attach and the indictment was invalid for lack of supporting evidence before the grand jury (R. 21–22; Pet. App. 31–33).

The court of appeals rejected the district court's reasoning, holding that there was "a complete absence of any positive factual showing that this Grand Jury did not at any time while it was hearing evidence concerning this transaction have before it some evidence from which it would infer a valuation in excess of $100" (Pet. App. 19).

ARGUMENT

In this Court, petitioner's attack upon the superseding April indictment is based upon the propositions (1) that the record discloses that no evidence was ever presented to the grand jury and (2) that, since the February indictment was dismissed as defective, no inference can be drawn that the February indictment (or, *a fortiori*, the April indictment) was supported by some competent evidence (Pet. 5, 7, 10–11, 12). Petitioner's first premise is wrong, and his second is a *non sequitur*.

1. In support of the first proposition, petitioner quotes statements in the district court's opinion to the effect that "no evidence" was submitted to the grand jury (Pet. 6). But the district court did not find that "no evidence" was ever presented to the grand jury. On the contrary, the court accepted, and petitioner did not dispute, government counsel's statement, in opposition to the motion to dismiss the April indictment, that the grand jury "had heard the Government's evidence" (see Statement, *supra*, p. 5) before it returned the February indictment. The

passages from the court's opinion which petitioner cites here show on their face and in context that the court was merely referring to the conceded fact that the evidence presented to the grand jury prior to the return of the February indictment was not presented to that body again prior to the return of the April indictment. Indeed, this was the very basis of the court's ruling dismissing the April indictment. Without questioning that there was an evidentiary basis for the February indictment, the court inferred that the new allegations in the April indictment as to the value of the note involved (see the Statement, *supra,* pp. 3–5) could not have been based upon any evidence the grand jury had heard in February, or otherwise the February indictment would have contained such allegations. Nor was the court willing to "assume * * * that there was evidence before the Grand Jury prior to the * * * [February] indictment as to the value of the note or the amount for which it was sold," as alleged in the April indictment (Pet. App. 32).

The February indictment was dismissed at the instance of the government because it had been superseded by the April indictment. The latter indictment was returned merely to meet petitioner's specific objection that the February indictment had not alleged the value of the note, but only that it was a note for $5,000 (see the Statement, *supra,* pp. 3–4). But this defect, if it be a defect, furnishes no basis for petitioner's contention that both indictments were thereby rendered vulnerable to attack on the ground that they were not based on any evidence. There was no dispute that the grand jury "heard the Government's

evidence" prior to the return of the February indictment or that it acted on that evidence in returning the April indictment.

2. The district court acted on mere surmise in holding that the new allegations in the April indictment as to the value of the note and the amount for which petitioner sold it were not based on evidence heard before it returned the February indictment. As the court of appeals pointed out, there was no showing that there was no such evidence before the grand jury (Pet. App. 19). In these circumstances, the rule of *Costello* v. *United States*, 350 U.S. 359, 363, is controlling: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."

Although petitioner would require a grand jury to rehear the same evidence it had heard previously before returning a superseding indictment, he offers no persuasive reason for this vain and useless procedure with its resultant delay. Rather, a far more logical rule, formulated by the court of appeals, is that a grand jury, having heard witnesses once, should not be obliged to recall them and hear repetitious evidence when it is reconsidering the same facts and circumstances (Pet. App. 19–20).[3] Accord, *Eidson* v. *United States*, 272 F. 2d 684, 687 (C.A. 10).

[3] Petitioner's contention (Pet. 8–9) that the court of appeals was not justified in reversing the "discretionary" action of the district court in dismissing the indictment is based upon cases decided prior to this Court's decision in the *Costello* case, *supra*. Those decisions were predicated upon the proposition that it is permissible to inquire into the adequacy or competency of the evidence before a grand jury and are no longer authoritative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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